No. 71-858

SEP 23 1972

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

THOMAS RICCI,

Petitioner,

vs.

CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGAL TRADING COMPANY, a corporation, and JOSEPH E. SIEGAL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITIONER'S REPLY BRIEF

JEROME H. TORSHEN
LAWRENCE H. EIGER
HARRY H. FORTES
11 South LaSalle Street
Chicago, Illinois 60603
Attorneys for Petitioner

JEROME H. TORSHEN, LTD.
Of Counsel

The Scheffer Press, Inc.—(312) 263-6850

TABLE OF CONTENTS

PAGE

I. RESPONDENTS HAVE MISSTATED THE POSTURE OF THE CASE BEFORE THIS COURT. 2

II. THE REGULATORY STRUCTURE IN THIS CASE DOES NOT REQUIRE AGENCY DETERMINATION OF ANTITRUST ISSUES. 4

A. The Regulatory Scheme is Not Pervasive. 5

B. This Court's Decision in *Silver* Does Not Authorize Antitrust Exemption in this Case. 8

C. Respondents Misinterpret the "Arguably Lawful" Doctrine. 9

CONCLUSION 11

Table of Cases

Allied Air Freight, Inc. v. *Pan American World Airways*, 393 F.2d 441 (2d Cir., 1968), *cert. denied*, 395 U.S. 846 (1968) 10

Breen Air Freight, Ltd. v. *Air Cargo, Inc.*, 1971 CCH Trade Cas. ¶73,775 (S.D.N.Y., 1971) 10

Carnation Co. v. *Pacific Westbound Conference*, 383 U.S. 213, 221-222 (1966) 10

Cohen v. *Cahill*, 281 F.2d 789 (9th Cir., 1969) 4

Costen v. *Pauline's Sportswear, Inc.*, 391 F.2d 81, 84 (9th Cir., 1968) 4

Fashion Originators Guild v. *Federal Trade Commission*, 312 U.S. 457 (1941) 5

PAGE

Klor's, Inc. v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) 3

Marnell v. *United Parcel Service of America*, 260 F. Supp. 391 (N.D.Cal., 1966) 10

Northern Pacific Railway Co. v. *United States*, 356 U.S. 1, 5 (1958) 5

Silver v. *New York Stock Exchange*, 373 U.S. 341 (1963) 8,9

United States v. *Radio Corporation of America*, 358 U.S. 334, 346 (1959) 6

United States v. *Topco Associates*, 405 U.S. 596, 609-612 (1972) 4,5

Walker Process Eqiupment, Inc. v. *Food Machinery and Chemical Corp.*, 382 U.S. 172, 174-175 (1965).... 2

STATUTES AND RULES

Commodity Exchange Act
- 7 U.S.C. §6a, b, c 6
- 7 U.S.C. §6f, g 6
- 7 U.S.C. §7a(8)(9) 6
- 7 U.S.C. §12a(5) 6
- 7 U.S.C. §12a(7) 6
- 7 U.S.C. §13, 13a-c 6
- 7 U.S.C. §13a 4
- 7 U.S.C. §13c(b) 7

Sherman Act, 15 U.S.C. §1 3,4

Federal Rules of Civil Procedure
- Rule 12(b) 3
- Rule 56 3

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-858

THOMAS RICCI,

Petitioner,

vs.

CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGAL TRADING COMPANY, a corporation, and JOSEPH E. SIEGAL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITIONER'S REPLY BRIEF

This Reply Brief is respectfully submitted by petitioner, Thomas Ricci, in response to the briefs filed by respondents Chicago Mercantile Exchange, Everette B. Harris, William Phelan, Leo Melamed (hereinafter sometimes collectively referred to as "respondent CME") and the brief filed by the Siegal Trading Company and Joseph E. Sie-

gal (hereinafter sometimes referred to collectively as "respondent Siegal").*

I. RESPONDENTS HAVE MISSTATED THE POSTURE OF THE CASE BEFORE THIS COURT.

Underlying respondents' briefs is the theme that the Exchange was engaged only in ordinary self-regulatory activities and was merely interpreting one of its own rules concerning the transfer of memberships. Thus, respondent CME warns against "harassing antitrust suits" which would somehow interfere with the Exchange's functions (CME pp. 16-19). Similarly, respondent Siegal urges that arbitration was open to petitioner but that he failed to avail himself of the opportunity to arbitrate (Siegal pp. 16-18). Respondents' arguments assume that the complaint alleges merely that a membership transfer somehow went awry and that this case is simply a question of whether the Exchange enforced its rules. However, the complaint alleges not a routine membership transfer, but rather that the Exchange "willfully, unlawfully, knowingly and maliciously confederated, combined, conspired and agreed . . ." with respondent Siegal to prevent petitioner from trading. (Complaint, ¶14, App. p. 11).

On a motion to dismiss, well pleaded allegations of a complaint must be accepted as true. *Walker Process Equipment, Inc.* v. *Food Machinery and Chemical Corp.*, 382 U.S. 172, 174-175 (1965). The Court of Appeals in this case found that the complaint stated a cause of action under the antitrust laws. The Court of Appeals held:

---

* References to the brief of respondent CME will be abbreviated "CME p. ...." and to the brief of respondent Siegal "Siegal p. ....".

"Accepting as we must appellant's allegations as to the reasons and manner in which he was excluded, there is no justification for the actions of the Exchange and the individual defendants. The transfer of his membership in violation of the rules of the Exchange and pursuant to a conspiracy to intentionally injure his business would constitute a group boycott, *per se* actionable under the Sherman Act." (App. p. 36)

Respondents have not petitioned for certiorari to review the holding of the Court of Appeals. Thus, this Court has before it the unchallenged finding that respondents' conduct constituted a group boycott, a *per se* violation of Section 1 of the Sherman Act. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). The issue before this Court is therefore not the reasonableness of respondents' conduct, but whether it is proper to refer a *per se* antitrust violation to an agency which cannot enforce the antitrust laws nor exempt violations thereof.

Respondents, to avoid the allegations of the complaint, cite excerpts from a deposition of petitioner and certain documents, thereby attempting to convert this matter from a motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure to a motion for summary judgment under Rule 56. This tactic was rejected in the Court of Appeals just as it should be rejected here. (Opinion, App. 34-35) Respondents have failed to inform the Court that when they filed their motions to dismiss,* the trial

* Respondent CME's motion was entitled "Motion to Dismiss for Lack of Jurisdiction Over the Subject Matter", respondent Siegal's motion was entitled "Motion to Dismiss". (App. pp. 20-21).

court ordered petitioner not to pursue discovery pending disposition of the motions. Respondents, thus, ask the Court to accept their view of the case based upon one-sided discovery. Respondents' reliance upon partially gathered evidence to which petitioner, by order of the trial court, was unable to respond is clearly improper. See, *Costen* v. *Pauline's Sportswear, Inc.*, 391 F.2d 81, 84 (9th Cir., 1968); *Cohen* v. *Cahill*, 281 F.2d 789 (9th Cir., 1960). Respondents' references to the Ricci deposition and the various documents attached thereto should thus be disregarded. This is a case which arises on the pleadings and should be treated as such.

II. THE REGULATORY STRUCTURE IN THIS CASE DOES NOT REQUIRE AGENCY DETERMINATION OF ANTITRUST ISSUES.

Although respondents urge primary reference to the Commodity Exchange Commission (hereinafter "CEC") and/or the Secretary of Agriculture (hereinafter "the Secretary") to determine antitrust issues, they fail to discuss the provisions of the regulatory statute. The statute (7 U.S.C. §13a) expressly limits the agency to the enforcement of the Commodity Exchange Act (hereinafter "CEA"), not the Sherman Act. With equal clarity, the CEA provides no authority to the CEC or the Secretary to exempt respondents from antitrust prohibitions. Nonetheless, respondents seek not merely a preliminary agency determination of factual issues, but exemption for their conduct. Respondents urge that the CEC and/or the Secretary should be given the opportunity to examine the reasonableness of their conduct. (See, e.g., CME pp. 22-23). The complaint, however, charges a *per se* violation of the antitrust laws and this Court has repeatedly held that *per se* offenses cannot be justified. *United States* v.

Topco Associates, 405 U.S. 596, 609-612 (1972); *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 5 (1958); *Fashion Originators Guild* v. *Federal Trade Commission,* 312 U.S. 457 (1941). Clearly an administrative determination cannot be used to evade the thrust of the *per se* rules by a consideration of the reasonableness of the conduct in question. In *Topco,* this Court stated:

> "There have been tremendous departures from the notion of a free enterprise system as it was originally conceived in this country. These departures have been the product of congressional action and the will of the people. If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision which must be made by Congress, and not by private forces or by the courts." (405 U.S. at 611)

In this case, Congress has confined the administrative agency to certain specified areas of regulation. This Court should reject respondents' attempt to dilute the *per se* rule. The Court should not permit the agency to determine the reasonableness of conduct when Congress has not given it that authority.

A. The Regulatory Scheme is Not Pervasive.

As the CEA provides no antitrust exemption, respondents have attempted to divine an exemption from the powers which the agency has in other areas. Respondents urge that the regulatory power of the CEC and the Secretary is "pervasive" and will support an implied exemption. But the term "pervasive" in primary jurisdiction cases means not merely that the administrator has broad regulatory powers, but rather that Congress has decided to replace competition with regulation in a particular

area. *United States* v. *Radio Corporation of America*, 358 U.S. 334, 346 (1959). Respondents have listed in detail the regulatory powers of the Secretary (CME pp. 11-12, 29-30; Siegal pp. 12-15). However, an examination of these regulatory duties shows that the determination of factual issues in a group boycott case will not disturb the regulatory functions of the administrator. The Secretary is empowered to:

1. Promulgate regulations to effectuate or accomplish "any of the purposes of *this chapter*". (7 U.S.C. §12a(5)) (emphasis supplied).

2. Register commission merchants and require that they maintain records and file reports. (7 U.S.C. §6f, g).

3. Disapprove any contract market rule relating to "terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or related to other trading requirements." (7 U.S.C. §12a(7)).

4. Prevent manipulation of futures prices, fraud, "bucketing" orders and other similar manipulative conduct. (See, 7 U.S.C. §6a, b, c).

The Secretary may also issue cease and desist orders, suspend contract markets or report criminal violations of the Act to the Department of Justice for prosecution. (7 U.S.C. §13, 13a-c). The Act also requires contract markets to enforce all rules relating to "terms and conditions in contracts of sale to be executed on or subject to the rules of such commodity market", and those rules which relate to "minimum financial standards and reporting requirements" for commission merchants. (7 U.S.C. §7a(8)(9)).

The Secretary may decline to report "minor violations" if he deems that "the public interest does not require such action." (7 U.S.C. §13c(b)).

None of these duties or enforcement objectives are in any way concerned with or designed to prevent a conspiracy between a contract market, its officers and one of its members to exclude another from trading. Respondents have failed to show that a guilty finding by a jury in a federal court based on the facts alleged in the complaint would have any effect upon the regulatory system. On the other hand, respondents imply that if the Secretary chose not to report respondents' conduct as a "minor violation" of the CEA, it would thereupon be exempt from the antitrust laws. Nothing in the statute authorizes this conclusion.

Congress has declined to replace competition as fostered by the antitrust laws with regulation in this industry. The brief of the United States, *amicus curiae*, sets out in detail the distinction between those industries (such as transportation) where regulation has replaced competition and commodities trading where no such substitution is contemplated. (See, Brief of Amicus Curiae, pp. 14-19, 22-25, see also, petitioner's brief, pp. 12-19). The regulation contemplated by the Commodity Exchange Act govern only certain clearly defined aspects of commodities trading. The administrator is not authorized to substitute regulation for competition.

Moreover, the United States, which allocates enforcement duties among its constituent agencies, has urged that petitioner's antitrust claim should be adjudicated in the District Court. The United States states:

> "The United States is interested in maintaining the proper division of responsibility between regulatory

agencies and the federal courts in the antitrust area, since an improper application of the primary jurisdiction doctrine could seriously impede the enforcement of the fundamental national economic policy which is expressed in federal antitrust laws." (Brief of Amicus Curiae, p. 2)

The government's position is particularly significant in this case since one of the three members of the CEC is the Attorney General of the United States, who filed a brief *amicus curiae*. If Congress has not given, and the executive branch has not sought, antitrust powers for the Secretary or the CEC, this Court should not engraft such authorization onto the regulatory statute.

B. This Court's Decision in Silver Does Not Authorize Antitrust Exemption in this Case.

Respondents rely on this Court's decision in *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963) as authority for exempting them from antitrust liability for participation in a group boycott. In *Silver*, the Exchange had ordered certain of its members to sever direct wire service with plaintiff, a non-member of the Exchange. This Court stated explicitly that the issue of primary jurisdiction was not before the Court. There the regulatory agency (the Securities and Exchange Commission) had power to disapprove Exchange rules similar to that which the Secretary has under the Commodity Exchange Act. But there as here, the agency had no jurisdiction to review the enforcement of such rules by exchanges. This Court stated:

"Although the Act gives to the Securities and Exchange Commission the power to request exchanges to make changes in their rules, §19(b), 15 U.S.C. §78s(b), and impliedly, therefore, to disapprove any

rules adopted by an exchange, . . . it does not give the Commission jurisdiction to review particular instances of enforcement of exchange rules. . . . This aspect of the statute, for one thing, obviates any need to consider whether petitioners were required to resort to the Commission for relief before going into court. Compare Georgia v. Pennsylvania R. Co., supra, 324 U.S. at 455. Moreover, the Commission's lack of jurisdiction over particular applications of exchange rules means that the question of antitrust exemption does not involve any problem of conflict or coextensiveness of coverage with the agency's regulatory power. . . . [citing cases] The issue is only that of the extent to which the character and objectives of the duty of exchanges self-regulation contemplated by the Securities Exchange Act are incompatible with the maintenance of an antitrust action." (373 U.S. at 357-358)

In this case, there exists no conflict between the administrative objectives in clearly defined areas and the application of antitrust laws to a group boycott against petitioner.

In 1968, with this Court's decision in *Silver* presumably before it, Congress amended the Commodity Exchange Act. It is significant that Congress chose not to include in those amendments any provision which would equate the Exchange's self-government functions with antitrust exemption.

C. Respondents Misinterpret the "Arguably Lawful" Doctrine.

Respondent Siegal's interpretation of the "arguably lawful" doctrine (Siegal, pp. 26-28) has no support in the authorities. Respondent's conduct cannot be justified by the regulatory act or by agency action taken under an

express or plainly implied provision of the CEA. *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 221-222 (1966); *Allied Air Freight, Inc.* v. *Pan American World Airways,* 393 F.2d 441 (2d Cir., 1968), *cert. denied,* 395 U.S. 846 (1968); *Marnell* v. *United Parcel Service of America,* 260 F.Supp. 391, 412 (N.D.Cal., 1966); *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.,* 1971 CCH Trade Case. ¶73,775 (S.D.N.Y., 1971). (See petitioner's brief, pp. 20-22).

The application of this rule is not, as respondent Siegal urges, (p. 27) dependent upon whether there was a prior administrative determination. In each of the decisions above cited, the matter had not been before an administrative agency. Indeed, in each of those cases, the issue was whether primary reference to the agency was proper under the doctrine of primary jurisdiction. Respondent Siegal argues that only the administrator can determine whether the antitrust violation was lawful under the regulatory statute. (Br. 27) The decisions in the above cases are clear that where, as here, the complaint seeks damages for past conduct which is not even of "debatable legality" under the regulatory scheme, primary reference to the administrator is improper.

Here, petitioner seeks damages for injury caused by a conspiracy between the Exchange, its officers and a member. This was an ordinary business conspiracy the formation and execution of which were not submitted to the administrator for approval. Since petitioner does not seek an injunction which would alter future transactions, an adjudication by a jury in the federal district court will in no way interrupt the administrator's regulatory functions.

CONCLUSION

By virtue of the foregoing, petitioner respectfully prays that the judgment of the court below be reversed and the cause remanded for further proceedings.

Respectfully submitted,

JEROME H. TORSHEN
LAWRENCE H. EIGER
HARRY H. FORTES
11 South LaSalle Street
Chicago, Illinois 60603
Attorneys for Petitioner

JEROME H. TORSHEN, LTD.
Of Counsel